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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	CR 11-3035-TUC-JGZ (HCE)
	)	
Plaintiff,	)	<b>ORDER</b>
	)	
vs.	)	
	)	
Tiffany Nicole Wilson,	)	
	)	
Defendant.	)	

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On November 18, 2011, Magistrate Judge Hector C. Estrada issued a Report and Recommendation on Defendant Tiffany Nicole Wilson’s Motion to Suppress. (Doc. 38.) Magistrate Judge Estrada recommended that Defendant Wilson’s Motion to Suppress (Doc. 16) be denied. On November 29, 2011, Defendant Wilson filed her Objection to the Report and Recommendation. (Doc. 41.) On November 29, 2011, the Government filed its Response to Defendant’s Objection to the Magistrate’s Report and Recommendation. (Doc. 42.) Upon independent review and for the reasons delineated herein, the Report and Recommendation is adopted.

**I. STANDARD OF REVIEW**

The Court reviews *de novo* the objected-to portions of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected-to portions of the Report and Recommendation. *Johnson v. Zema*

1 *Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also Conley v. Crabtree*,  
2 14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

## 3 **II. FACTUAL BACKGROUND**

4 The factual background contained in Magistrate Judge Estrada's Report and  
5 Recommendation (Doc. 38) is adopted by reference herein.

## 6 **III. DISCUSSION OF DEFENDANT'S OBJECTIONS**

### 7 **A. Grounds I and II**

8 In *United States v. Martinez-Fuerte*, the Supreme Court held that permanent  
9 immigration checkpoints are constitutional. 428 U.S. 543, 556 (1976). At these checkpoints,  
10 a vehicle may be stopped and its occupants briefly questioned, even without any  
11 particularized suspicion that a vehicle contains illegal aliens. *United States v. Villamonte-*  
12 *Marquez*, 462 U.S. 579, 587 (1983) (citing *Martinez-Fuerte*, 428 U.S. at 545). Although the  
13 Supreme Court has not addressed the constitutionality of temporary immigration checkpoints,  
14 the Ninth Circuit has stated that temporary immigration checkpoints that are the functional  
15 equivalent of permanent checkpoints are constitutional and should be analyzed in the same  
16 manner. *United States v. Hernandez*, 739 F.2d 484, 487-88 (9th Cir. 1984).

17 The constitutionality of a checkpoint turns on its primary purpose, which is  
18 determined by identifying the independent administrative justification for the checkpoint and  
19 evaluating whether the scope of what is permissible under that justification is exceeded.  
20 *United States v. Soto-Camacho*, 58 F.3d 408, 412 (9th Cir. 1995). To determine the primary  
21 purpose of the checkpoint, courts have examined whether the procedure employed to stop  
22 each vehicle was routinely and evenly applied, whether the stop would be abusive and  
23 harassing because of officer discretion, and whether the appearance of authority of the  
24 officers at the checkpoint allayed the concerns of the lawful travelers. *See Soto-Camacho*,  
25 58 F.3d at 411 and *Hernandez*, 739 F.2d at 487 (citing *Martinez-Fuerte*, 428 U.S. at 558-59).  
26 The Ninth Circuit has held that a seizure is reasonable under the Fourth Amendment when  
27 conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all  
28 vehicles for illegal aliens. *Soto-Camacho*, 58 F.3d at 411.

1 In this case, the evidence showed that the Three Points Border Patrol checkpoint  
2 (“Three Points Checkpoint”) is a clearly visible temporary checkpoint where each vehicle  
3 is funneled through a single lane and uniformed border patrol agents are always present to  
4 inspect vehicles for immigration violations. On August 7, 2011, Agent Romero worked as  
5 the primary agent at the checkpoint where he was the first agent to greet and question  
6 vehicles as they drove by. Agent Romero testified that the checkpoint consists of a canopy  
7 station, cones which are lined up to direct vehicles through the checkpoint and signs to alert  
8 traffic. The checkpoint is operated daily by uniformed border patrol agents. Agent Romero  
9 testified that his primary purpose while working at the checkpoint was to conduct  
10 immigration inspections. In June 2011, during his 45-day detail from New Mexico, Agent  
11 Romero conducted immigration inspections at the Three Points Checkpoint approximately  
12 once a week. He described his responsibilities at the checkpoint as essentially the same as  
13 those in New Mexico - to conduct immigration inspections. Agent Romero explained when  
14 he works at the checkpoint, he is looking for the same thing he looks for when he is  
15 patrolling in a vehicle, the only difference at a checkpoint is that the vehicles approach you.

16 Defendant contends that the Three Points Checkpoint was operated as a pretext for  
17 a drug search rather than a permissible checkpoint with a limited regulatory function. In  
18 support, Defendant cites (1) Agent Romero’s testimony that he was given no instructions  
19 about how the particular checkpoint was to be operated and relied on his generalized  
20 academy training on how checkpoints are run and (2) Agent Romero’s inability to identify  
21 any formal training or instructions that he received on how to run this specific checkpoint.

22 As an initial matter, Defendant’s factual assertions are not supported by the record.  
23 When Defense counsel asked Agent Romero if he had received any training specific to the  
24 checkpoint, Agent Romero responded affirmatively. Agent Romero indicated he was  
25 working with other agents and supervisors who had worked the checkpoint and that he knew  
26 what to do on the date of Defendant’s arrest because of his training and his experience  
27 working the Three Points Checkpoint prior to Defendant’s arrest. Although there was little  
28 testimony as to how much discretion Agent Romero was given in conducting his immigration

1 responsibilities, as discussed below, there was no evidence that Agent Romero or any other  
2 agent exceeded the scope of what was permissible for detection of immigration violations at  
3 the Three Point Checkpoint - in this specific case or generally.

4       The Court rejects Defendant's argument that agents exceeded the scope of the  
5 immigration purpose of the checkpoint at primary inspection. After an initial stop of a  
6 vehicle at an immigration checkpoint, an agent may conduct brief questioning of the  
7 occupants of a vehicle without individualized suspicion. *Martinez-Fuerte*, 428 U.S. at 562.  
8 The seizure is constitutional so long as the scope of the detention is limited to a few brief  
9 questions concerning immigration, production of documents, and a visual inspection of the  
10 vehicle limited to what can be seen without a search. *Id.* at 558. Here, Defendant spoke  
11 with Agent Romero at the primary checkpoint for approximately one minute. During that  
12 time, Agent Romero asked Defendant and her passenger if they were U.S. citizens, where  
13 they were going, where they had traveled from, and if Defendant was a member of the  
14 Tohono O'odham Indian Nation. The initial questioning was clearly permissible in its scope  
15 and purpose.

### 16       **B. Ground III**

17       Defendant's third argument challenges the level of suspicion required to order a  
18 vehicle to secondary inspection and continued detention thereafter. Defendant contends that  
19 Agent Romero lacked any suspicion to order Defendant to secondary, and therefore the  
20 detention at secondary was unreasonable.

21       Where there is evidence that the referral to secondary is to continue an immigration  
22 investigation, an agent need not harbor an articulable suspicion even if ultimately the vehicle  
23 is searched for drugs. *United States v. Barnett*, 935 F.2d 178, 181-82 (9th Cir. 1991). In this  
24 case, the magistrate judge properly concluded Agent Romero was not satisfied with the  
25 Defendant's answers to his questions and therefore, could refer Defendant to secondary for  
26 further immigration questioning. Agent Romero testified that he directed Defendant to the  
27 secondary inspection area based on Defendant's responses to his questions, her nervousness  
28 and the passenger's failure to respond to his questions. Although Defendant claimed she had

1 dropped her brother off in Sells, she did not understand Agent Romero's question regarding  
2 the "T.O." - a reference to the Tohono O'odham Nation in Sells. Defendant was nervous  
3 and avoided eye contact. Moreover, Defendant's passenger failed to affirmatively respond  
4 to Agent Romero's inquiry as to her citizenship.<sup>1</sup>

5 While at secondary, Agent Romero asked Defendant for identification documents and  
6 asked further questions regarding her presence in the area. Although Defendant stated that  
7 she had traveled from her mother's house in Sells, Defendant could only provide vague  
8 directions, and Agent Romero believed she was being untruthful. She did not have  
9 identification. During the questioning, which lasted approximately five to ten minutes, Agent  
10 Romero noticed Defendant still appeared nervous. Because Agent Romero continued his  
11 immigration investigation at secondary, no suspicion was required to justify the extended  
12 detention.<sup>2</sup>

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14 <sup>1</sup>Agent Romero and Agent Magsamen's testimony differed as to the time at which  
15 Agent Romero asked Agent Magsamen to retrieve his canine. Agent Romero testified that  
16 he requested the canine while Defendant was at secondary. Agent Magsamen testified that  
17 Agent Romero signaled him for the dog before Defendant left primary. Whether Agent  
18 Romero requested the canine at primary or secondary does not alter the analysis of the  
19 reasonableness of the detention because: (1) the evidence shows that the referral was  
warranted for continued immigration investigation, and (2) the canine was trained to  
discover concealed persons as well as drugs.

20 <sup>2</sup> Even if immigration questioning had ceased, Defendant's detention for a minimal  
21 period of time was permissible. A brief detention is permitted following valid immigration  
22 questioning so long as the government can make a "minimal showing of suspicion." *United*  
23 *States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991). A driver's nervous behavior is sufficient  
24 to meet this standard. *See United States v. Preciado-Robles*, 964 F.2d 882, 884 (9th Cir.  
25 1992) (driver's nervous demeanor during secondary inspection provided a basis for pursuing  
26 immigration inspection and requesting permission to search the car even after the driver and  
27 passenger produced valid immigration documents). In *Taylor*, the defendant was referred  
28 to secondary after displaying nervous behavior; he was questioned about his citizenship and  
consented to search of the trunk of his car. 934 F.2d at 219. Agents confirmed that the  
defendant was a U.S. citizen and no persons were found in the trunk, however, the defendant  
was detained for an additional minute while agents utilized a canine that indicated the  
presence of drugs. *Id.* The Court held that the continued detention was reasonable even after  
agents dispelled the existence of an immigration violation because agents made a minimal

1           **C. Ground IV**

2           Defendant asserts that Agent Romero was required to have an articulable suspicion  
3 to refer Defendant to secondary. For the reasons articulated above, this argument is without  
4 merit.

5           **D. Ground V**

6           Defendant objects to the magistrate judge's determination that the warrantless search  
7 of Defendant's vehicle was supported by her voluntary consent. Arrests or searches at  
8 immigration checkpoints must be justified by either probable cause or consent. *Martinez-*  
9 *Fuerte*, 428 U.S. at 567. Voluntariness is based on the totality of the circumstances.  
10 *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25 (1973). Five relevant factors include: "(1)  
11 whether the defendant was in custody; (2) whether the arresting officer had drawn a gun; (3)  
12 whether *Miranda* warnings had been given; (4) whether the defendant was told he had a right  
13 not to consent; and (5) whether the defendant was told a search warrant could be obtained."  
14 *Preciado-Robles*, 964 F.2d at 885. "The fact that some of these factors are not established  
15 does not automatically mean that consent was not voluntary." *Id.* (quoting *United States v.*  
16 *Castillo*, 866 F.2d 1071, 1082 (9th Cir. 1988)).

17           Agent Romero asked Defendant for permission to search the trunk; she acquiesced by  
18 stating, "yes, go ahead" and handed the agent the keys from the ignition. Defendant was  
19 neither placed under arrest nor told that she was under arrest. Rather, she was detained in  
20 her car by border patrol agents for five to ten minutes during their investigation. She was not  
21 handcuffed. Neither agent drew their weapon or made a show of force. She was not given  
22 *Miranda* warnings and, although she was not advised that she not required to give her  
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24           \_\_\_\_\_ showing of suspicion. *Id.* at 221.

25           Agent Romero's further questioning of Defendant was also supported by minimal  
26 suspicion. Here, unlike *Taylor*, Agent Romero was still investigating Defendant and her  
27 passenger's legal status and possible involvement in alien smuggling. The dog was utilized  
28 while Agent Romero spoke with Defendant. Defendant's nervous behavior and ostensibly  
untruthful answers combined with the brief detention was sufficient to establish a minimal  
showing of suspicion.

1 consent, she also was not informed that if she did not consent, a search warrant would be  
2 obtained. The first, second and fifth factors favor the government; the third and fourth factors  
3 weigh in favor of Defendant. Under the totality of the circumstances, the Magistrate Judge  
4 properly concluded that Defendant's consent was voluntary, and therefore, the search of the  
5 vehicle's trunk was constitutional.

6 Defendant contends that the agents effectively coerced her consent because Agent  
7 Magsamen misled Defendant by loudly stating that the dog alerted, and Agent Magsamen  
8 "made sure that Ms. Wilson could hear that he said that his canine had 'alerted' to the trunk."  
9 (Doc. 41, p. 16). Defendant has no evidentiary support for this contention. Agent Magsamen  
10 testified that the dog alerted to Defendant's vehicle by sitting down, which is a trained  
11 behavior. (Magsamen at p. 100.) And he "let Agent Romero know that [the] dog had alerted  
12 and indicated the trunk of the vehicle." (*Id.*)<sup>3</sup> There was no testimony as to the volume or  
13 manner in which Agent Magsamen informed Agent Romero. Moreover, there was no  
14 suggestion that such a statement would have been misleading.

15 Because the Court concludes that Defendant's consent provided a proper basis to  
16 search the trunk, the Court does not address Defendant's remaining challenges to that search.

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#### 20 21 **IV. CONCLUSION**

22 Accordingly, IT IS HEREBY ORDERED as follows:  
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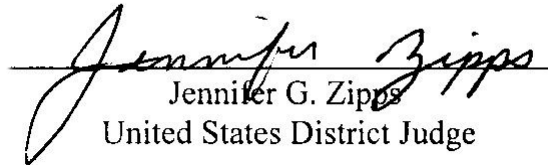
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25 <sup>3</sup>Defendant suggests that Agent Magsamen's testimony regarding his dog's actions  
26 is not credible because his report mentions the dog's "alert," but not that the canine sat down  
27 or "indicated." Although Agent Magsamen may not be a skilled report writer, the omission  
28 in the report does not, in and of itself, undermine the Magistrate Judge's very detailed  
description of the testimony and his finding that the dog indicated in the manner in which  
Agent Magsamen testified.

1 (1) United States Magistrate Judge Estrada's Report and Recommendation (Doc. 38)  
2 is **accepted and adopted**.

3 (2) Defendant's Motion to Suppress (Doc. 16) is **denied**.

4 DATED this 12th day of January, 2012.  
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11 Jennifer G. Zipps  
12 United States District Judge  
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